No. 84-1037

Office-Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1984

EARL HENDERSON,

Petitioner,

vs.

SPERDUTO, SPECTOR & VANACORE
(formerly Sperduto, Priskie, Spector & Vanacore),

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT, STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

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QUESTIONS PRESENTED

1. Whether or not petitioner has been denied due process by the New York state courts due to the courts' refusal to consider evidence of a party's perjury during an arbitration proceeding.

2. Whether or not N.Y. CPLR §7511 is unconstitutional because it precludes the court, on a motion to confirm an arbitration award, from considering evidence of a party's perjury during an arbitration hearing.

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No.

In The

Supreme Court of the United States

October Term, 1984

EARL HENDERSON,

Petitioner,

vs.

SPERDUTO, SPECTOR & VANACORE
(formerly Sperduto, Priskie, Spector & Vanacore),

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT, STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Earl Henderson, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New York, Westchester County, entered in the above-entitled case on December 28, 1982, and subsequent orders of the appellate courts of that state affirming the decision below and denying petitioner's motions for leave to appeal.

OPINIONS BELOW

The award of arbitrator is printed in the Appendix hereto, *infra,* page 16a. The opinion of the Supreme Court of the State of New York, Westchester County is unreported and is printed in the Appendix hereto, *infra,* page 10a. The order of the Supreme Court of the State of New York, Appellate Division, Second Department affirming the trial court decision is printed in the Appendix hereto, *infra,* page 5a. The order of the Appellate Division denying petitioner's motion for leave to appeal to the Court of Appeals of the State of New York is printed in the Appendix hereto, *infra,* page 3a. The order of the Court of Appeals denying petitioner's motion to appeal to the Court of Appeals is printed in the Appendix hereto, *infra,* page 1a.

JURISDICTION

The order of the New York Court of Appeals denying petitioner' motion for leave to appeal (1a) was entered on September 20, 1984. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1257(2)-(3).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutory provisions involved in this matter are the New York Civil Practice Law and Rules, Section 7511 (*see* Appendix at 22a-24a).

The constitutional provisions involved are the Fifth and Fourteenth Amendments to the United States Constitution (*see* Appendix at 22a-24a).

STATEMENT OF THE CASE

In 1977, petitioner Earl Henderson (hereinafter "petitioner") withdrew from the accounting firm of Sperduto, Spector & Vanacore (hereinafter "Sperduto"). Following his withdrawal, Henderson established his own practice under which he continued to serve several of Sperduto' s former clients. On August 10, 1978, Sperduto filed a demand for arbitration pursuant to the Partnership Agreement governing the relations between the parties.

The parties litigated their respective claims during extensive arbitration hearings which concluded on August 18, 1980. On October 6, 1980, petitioner received the arbitrator's decision awarding Sperduto $26,070.82 for the "value of its former clients serviced by Henderson after his withdrawal from the firm." Henderson was given a credit in the sum of $2,733.65 for pension funds due to him. All other claims and counterclaims were denied. (*See* copy of arbitrator's award in Appendix, 17a.)

In September, 1980, Sperduto moved to confirm the arbitrator's award. A hearing was held on September 28, 1982, before the Honorable Carmine C. Marasco, at which time Judge Marasco confirmed the award and denied petitioner's cross-motion to vacate. In Judge Marasco's opinion, (*see* copy attached to Appendix, 10a), he stated:

> The reliance placed by Respondent on the claim that Mr. Sperduto, the witness, for claimant before the arbitrator gave wilfully false testimony is not one of the grounds for setting aside the award as provided in CPLR 7511. In view thereof, this court cannot consider the evidence in support of that contention. [13a].

Sperduto submitted several documents at the arbitration in support of his position. Yet, Sperduto's own testimony revealed

that the exhibits were not accurate. The arbitrator allowed Sperduto to revise these exhibits after their initial submission. However, Sperduto's testimony *again* showed that the revised exhibits were *still* untrue. Over petitioner's objection, the arbitrator apparently considered these exhibits, despite the fact that they were never formally admitted into evidence.

In support of petitioner's contention that Sperduto perjured himself during the arbitration hearings, Philip D. Neuer, Esq., petitioner's attorney during the arbitration, testified. He clearly established that Sperduto had repeatedly perjured himself during the arbitration proceedings by reference to numerous instances in the transcript. Sperduto's perjury was obvious because he changed his story numerous times, and testified inconsistently, during the proceeding. However, as previously stated, Judge Marasco refused to even consider this evidence when deciding Sperduto's motion to confirm.

Petitioner appealed as of right to the Appellate Division, Second Department, believing that he had been denied due process by the court's refusal to consider evidence of Sperduto's perjury. The Appellate Division affirmed the decision below without opinion. Petitioner then moved both the Appellate Division and the Court of Appeals for leave to appeal to the Court of Appeals; both motions were denied without opinion.

HOW FEDERAL QUESTION IS PRESENTED

During the hearing to confirm or vacate the arbitration award and by his post-trial brief submitted to Judge Marasco, petitioner's counsel urged that Sperduto's perjury should be considered by the court in determining the validity of the arbitration award. Judge Marasco decided this issue in favor of Sperduto, holding that evidence of a party's perjury cannot be considered by the court when entertaining a motion to confirm or vacate an arbitration award. (*See* Judge Marasco's decision, Appendix, 10a.)

Petitioner's due process argument was also raised in the briefs submitted in support of petitioner's appeal. Relevant portions of the brief are as follows:

> As a final consideration, the court should note that Henderson is appealing the refusal of the court below to consider perjury as a ground for vacating the award. Thus, it would have been understandable had the court below *considered* the evidence of perjury and concluded it was either insufficient or unproven. Instead, Judge Marasco stated:
>
> "The reliance placed by Respondent on the claim that Mr. Sperduto, the witness, for claimant before the arbitrator gave wilfully false testimony is not one of the grounds for setting aside the award as provided in CPLR §7511. In view thereof, this Court cannot consider the evidence in support of that contention."
>
> Thus, Henderson appeals from the order denying his motion to vacate that award. Although the effect of the present appeal is an attempt to vacate the judgment below, the error below was failure to consider perjury evidence in a motion to vacate *the award*. (Petitioner's brief to Appellate Division, page 32-33).

This portion of petitioner's brief was in response to Judge Marasco's statement that perjury cannot be considered. Thus, Judge Marasco, in his opinion, effectively raised a federal question by denying petitioner due process under the Fifth and Fourteenth Amendments to the United States Constitution in failing to even consider relevant evidence. Unfortunately, the Appellate Division,

Second Department, affirmed the trial court's decision without opinion and thus a more complete record regarding the federal question was not made. Similarly, petitioner's motions for leave to appeal to the Court of Appeals were also denied without opinion. As a result, this very important question of the effect that perjured testimony has on the validity of an arbitration award has only been addressed by a trial level judge within the state court system, probably because of the Court of Appeals' prior decision in *Jacobwitz v. Metselaar,* 268 N.Y. 130, 197 N.E. 169 (1935). Furthermore, even if the New York state court system more fully addressed the issue of Sperduto's perjury, undoubtedly, the issue would have been decided against petitioner, based on the holding in *Jacobwitz.* Therefore, the federal question was effectively raised and decided by the New York state courts.

REASONS FOR GRANTING THE WRIT

I.

Certiorari should be granted to resolve conflicts in principle among the lower courts.

The issue of whether or not a court, on a motion to confirm or vacate an arbitration award, may consider evidence of a party's perjury has not, to the best of petitioner's knowledge, been resolved by this Court. The lack of Supreme Court authority on this issue has led to a split among the state courts in their treatment of a party's perjury during an arbitration hearing.

The Supreme Court of Oregon in its decision in *Fire Association of Philadelphia v. Allesina,* 49 Or. 316, 89 P. 960 (1907) held that an arbitration award based on the fraud or false testimony of the person insured will be set aside in equity by the reviewing court. The Alabama Supreme Court in *Chambers v. Crook,* 42 Ala. 171, has decided this issue in a similar fashion.

On the other hand, the Court of Appeals of the State of New York has held that perjured testimony of a party would not warrant setting aside a judgment entered on an arbitration award. *Jacobwitz v. Metselaar,* 268 N.Y. 130, 197 N.E. 169 (1935). Similar holdings were handed down by the Georgia and Vermont Supreme Courts respectively in *Tinsley v. Maddox,* 176 Ga. 471, 168 S.E. 297; and *French v. Raymond,* 82 Vt. 156, 72 A. 324. Moreover, the United States Court of Appeals for the Second Circuit, in its decision in *Karppinen v. Kiefer,* 187 F.2d 32 (2d Circuit 1951), confirmed that the issue of perjury during an arbitration proceeding is an unsettled issue. A relevant passage from the decision in *Karppinen* illustrates this point:

> We will assume, as did the court below, that an arbitration award may be set aside in a case of material perjured evidence furnished the arbitrators by a prevailing party, but we do not decide the somewhat disputed question whether the word "fraud" in Section 10(a) of the Arbitration Act has a broader scope than that word has when applied so as to permit a collateral attack on a judgment rendered upon perjured testimony. As to the rule in equity, compare *French v. Raymond,* 82 Vt. 156, 72 A. 324, with *Fire Ass'n of Philadelphia v. Allesina,* 49 Or. 316, 89 P. 960; as to the rule under the comparable New York Statute, see *Jacobwitz v. Herson,* 268 N.Y. 130, 136, 197 N.E. 169 (1935). 187 F. 2d at 34-35.

Several secondary authorities have also confirmed that there is a split in state court decisions of last resort regarding the treatment of perjury by a successful party in arbitration proceeding. The following passages from *American Jurisprudence* and *Corpus Juris Secundum* are indicative of this split:

There is a decided conflict of authority on the question whether perjured testimony before the arbitrators is ground for impeaching an award. In some jurisdictions an award may be avoided or set aside for perjury or for a false testimony procured and laid before the arbitrators by the successful party.[9] (Citing various authorities). Other authorities take the view that perjury, or subordination of perjury is not of a sufficient ground for setting aside an award, for the question whether any testimony was false is one of those determined by the arbitrators, which cannot afterward be questioned.[9] (Citing various authorities). 5 American Jurisprudence 2d, *Arbitration and Award* §177, page 649.

"There is a conflict of authority as to whether the presentation of a false claim, or the use of false or perjured testimony to procure the award, is sufficient ground for setting it aside."

According to some cases an award, like a judgment, will be interfered with only for fraud in obtaining it which is such as prevents the losing party from having a fair adversary trial of the issues[21] (Citing various authorities); and hence an award will not be set aside merely because a claim submitted to arbitration was false[22] (Citing various authorities), or the award was induced by false swearing or perjured testimony[23] (Citing various authorities), for although such conduct is a fraud in obtaining the award it does not prevent an adversary trial. It has particularly been so held where the award has been made a judgment of the court under statute prescribing the arbitration

> procedure and the grounds for setting the award aside.[24] (Citing various authorities)
>
> Other cases, however, have held that an award may be set aside because obtained upon the false testimony of a party[25] (Citing various authorities) or because a party suppressed material facts which effected the determination of the arbitrators[26] (Citing various authorities). 6 C.J.S., *Arbitration* §152(b), page 401-402. [Footnotes omitted.]

As indicated above, the highest courts of various states throughout the United States vary in their treatment of perjury by a party during an arbitration hearing. Therefore, it is imperative that the Court resolve this question in order to establish uniform treatment of this issue throughout the country.

II.

Petitioner has not been afforded procedural and substantive due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

In oral argument of the motion to confirm or vacate the arbitration award, petitioner's attorney simply and straight forwardly set forth the numerous instances of perjury committed by Sperduto during the arbitration hearing. Each instance of perjury was provable within the transcript of the hearing; no outside references were necessary. Judge Marasco, in construing New York CPLR §7511, found that he could not consider evidence of a party's perjury in deciding a motion to confirm or vacate an arbitration award. As a result, Sperduto's motion to confirm the award was granted, and petitioner's motion to vacate the award was denied.

Petitioner's appeal to the Appellate Division, Second Department, met with substantially the same treatment. The

Appellate Division affirmed Judge Marasco's decision, without opinion. Subsequent motions for leave to appeal to the Court of Appeals were denied by both the Appellate Division and the Court of Appeals. Therefore, the only court which heard evidence of Sperduto's perjury during the arbitration hearing construed the statute as not to allow consideration of this perjury in deciding the above-mentioned motion. This uniform refusal of the New York state courts to address the issue was presumptively based on the Court of Appeals decision in *Jacobwitz v. Metselaar, supra.*

This refusal to consider a party's perjury during an arbitration proceeding evidenced a denial of due process to the petitioner. Inherent in the provisions of the Constitution is the fact that a litigant must be afforded an opportunity to be heard prior to adjudication. Although petitioner's evidence was heard by the trial court, Judge Marasco's construction of the New York state statute regarding confirmation of arbitration awards precluded him from considering this evidence in deciding the motion. It is submitted that this scenario is a deprivation of due process as guaranteed by the Fourteenth Amendment.

As construed by Judge Marasco, §7511 of the New York CPLR is repugnant to the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of United States. Rather than arbitrarily precluding a reviewing court from considering a party's perjury, the decision should be left up to the discretion of each individual judge. The blanket refusal by the New York state court system to consider evidence of perjury is a denial of due process akin to denying a litigant the right to be heard at all!

A substantial public policy argument exists in support of a Supreme Court review of this issue. Under the current state of the law in New York, even evidence of a party's *criminal conviction* for uttering perjured testimony would not enable the aggrieved

party to vacate the arbitration award. Therefore, a situation may result where a party to an arbitration, convicted of perjury and sentenced to prison, is nevertheless able to enjoy the fruits of his perjured testimony through a favorable arbitration award. This anomaly in the law actually encourages a party to an arbitration to offer lies and misstatements, especially when the stakes are high. The fact that a convicted criminal will be favored by the current rule in New York when an aggrieved party moves to vacate an award must not be countenanced by this Court. Rather, state courts should be obligated to at least consider a party's evidence of perjury when determining whether or not confirm an award. To the extent that N.Y. CPLR §7511 prohibits such consideration, it is unconstitutional.

It is truly unfortunate that the deference given to the arbitration process has evolved to the point where an arbitration judgment is conclusively presumed to be superior to that of an experienced trial judge. It is beyond comprehension how this quasi-judicial institution has reached such a revered status, effectively precluding judicial scrutiny of its decisions and awards. The time has come for the Court to take back some of the unbridled authority afforded to the arbitrators of this nation so that they are forced to conduct their hearings more in accordance with legal standards and practices. To require less is a deprivation of due process to the parties involved in arbitration, a result not envisioned by our forefathers when the concept of arbitration was first developed.

CONCLUSION

Wherefore, petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

CHARLES C. ABUT
LOWEN & ABUT, P.A.
Attorneys for Petitioner

APPENDIX

ORDER DENYING MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS OF THE STATE OF NEW YORK, SEPTEMBER 20, 1984

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twentieth day of September A.D. 1984

PRESENT, Hon. Lawrence H. Cooke, *Chief Judge, presiding.*

RECEIVED SEP. 24, 1984
Anderson, Banks, Moore & Hollis

2 Mo. No. 862

Sperduto, Spector & Vancore (formerly Sperduto, Priskie, Spector & Vancore),

Respondent,

vs.

Earl Henderson,

Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Order

ORDERED, that the said motion be and the same hereby is denied.

s/ Donald M. Sheraw
Clerk of the Court

ORDER DENYING MOTION FOR LEAVE TO APPEAL TO COURT OF APPEALS OF THE APPELLATE DIVISION, SECOND DEPARTMENT, STATE OF NEW YORK OF MAY 25, 1984

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on May 25, 1984.

HON. LEON D. LAZER, Justice Presiding
HON. MOSES M. WEINSTEIN
HON. RICHARD A. BROWN
HON. CHARLES B. LAWRENCE
Associate Justices

LOWEN & ABUT
Aug. 2, 1984
RECEIVED

In the Matter of Sperduto, Spector & Vanacore (formerly Sperduto, Priskie, Spector & Vanacore),

Respondent,

v

Earl Henderson,

Appellant.

In the above entitled cause, the appellant having moved for leave to appeal to the Court of Appeals from an order of this court dated March 26, 1984, which determined an appeal from a judgment of the Supreme Court, Westchester County, entered December 27, 1982;

Order

Now, upon the papers filed in support of and in opposition to the motion, and the motion having been duly submitted and due deliberation having been had thereon, it is

ORDERED that the motion is hereby denied.

Enter:

s/ Irving N. Selkin
Clerk of Appellate Division

Supreme Court, State of New York
Appellate Division, Second Dept.

I, IRVING N. SELKIN, Clerk of the Appellate Division of the Supreme Court, Second Judicial Department, do hereby certify that I have compared this copy with the original filed in my office on 5/25/84 and that this copy is a correct transcription of said original.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this Court on 7/25/84.

s/ Irving N. Selkin
Clerk

ORDER ON APPEAL FROM JUDGMENT OF THE APPELLATE DIVISION, SECOND DEPARTMENT, STATE OF NEW YORK OF MARCH 26, 1984

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on March 26, 1984

HON. LEON D. LAZER, Justice Presiding,
HON. MOSES M. WEINSTEIN
HON. RICHARD A. BROWN
HON. CHARLES B. LAWRENCE
Associate Justices

In the Matter of Sperduto, Spector & Vanacore (formerly Sperduto, Priskie, Spector & Vanacore),

Respondent,

v.

Earl Henderson,

Appellant.

In the above entitled cause, the above named Earl Henderson, respondent in the court below, having appealed to this court from a judgment of the Supreme Court, Westchester County, entered December 27, 1982; and the said appeal having been submitted by Michael E. Klein, Esq., of counsel for the appellant, and submitted by Daniel Hollis, III, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

Order

ORDERED that the judgment appealed from is hereby unanimously affirmed, with cost.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division

____AD2d____ S - February 28, 1984

472 E In the Matter of Sperduto, Spector & Vanacore (formerly Sperduto, Priskie, Spector & Vanacore), respondent, v Earl Henderson, appellant.

Lowen & Abut, P.A., New York, N.Y. (Michael E. Klein of counsel), for appellant.

Anderson, Banks, Moore & Hollis, Mount Kisco, N.Y. (P. Daniel Hollis, III on the brief), for respondents.

Judgment of the Supreme Court, Westchester County (MARASCO, J.), entered December 27, 1982, affirmed, with costs. No opinion.

LAZER, J.P., WEINSTEIN, BROWN and LAWRENCE, JJ., concur.

March 26, 1984

JUDGMENT OF THE HONORABLE CARMINE C. MARASCO OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF WESTCHESTER DATED DECEMBER 27, 1982

Index No. 19582/80

In the Matter of Entering Judgment on the Award of Arbitration between SPERDUTO, SPECTOR & VANACORE (Formerly SPERDUTO, PRISKIE, SPECTOR & VANACORE),

Petitioner,

-against-

Earl Henderson,

Respondent.

Petitioner, Sperduto, Spector & Vanacore (Formerly Sperduto, Priskie, Spector & Vanacore), having applied for confirmation of the Award of Arbitration herein, signed and acknowledged on the 30th day of September, 1980, a copy of which is annexed hereto whereby petitioner was awarded the sum of Twenty Six Thousand Seventy Dollars and Eighty Two Cents ($26,070.82) subject to a credit in the sum of Two Thousand Seven Hundred Thirty Three Dollars and Sixty Five Cents ($2,733.65) and whereby petitioner was awarded the additional sum of One Hundred Thirty Dollars ($130.00) for administrative expenses and fees for a total of Twenty Three Thousand, Four Hundred Sixty Seven Dollars and Seventeen Cents ($23,467.17); and said application for confirmation having been granted by order of Marasco, J. of this Court entered 10-28-82, a copy of which is annexed hereto, now it is further

Judgment

ORDERED, ADJUDGED AND DECREED that the said petitioner, Sperduto, Spector & Vanacore, having offices at 10 Columbus Circle, New York, New York 10019, do recover of the respondent Earl Henderson, having an office at 459 East Main Street, Chester, New Jersey, the sum of $26,076.82, said amount being the amount awarded by the Arbitrator under the first claim in the Demand for Arbitration; and it is further

ADJUDGED that respondent Earl Henderson shall be entitled to receive a credit of $2,733.65 against said amount of $26,070.82, on condition that said Respondent quit claim and provide an appropriate executed release to the Pension Fund trustee, as provided for in the said Award of Arbitration, and it is further

ADJUDGED that the Petitioner, Sperduto, Spector & Vanacore shall have and recover from the said Respondent Earl Henderson the additional sum of $130.00 for that portion of its share of the administrative fees and expenses of arbitration previously advanced by Petitioner to the American Arbitration Association, and it is further

ADJUDGED that Sperduto, Spector & Vanacore, the petitioner, have and recover from Earl Henderson, the Respondent, interest on the aforesaid amounts, at the rate of 6% per year, as of September 30, 1980, the date of the acknowledgment of said Award of Arbitration through June 25, 1981 and at the rate of 9% thereafter, and the costs as taxed by the Clerk of this Court in the sum of $25.00; and that the Petitioner have execution for the amounts so awarded hereunder.

Dated: White Plains, New York

Judgment

s/ Carmine C. Marasco
Justice, Supreme Court of the
State of New York,
Westchester County

s/ George Monaco, Jr.
Clerk

OPINION OF HONORABLE CARMINE C. MARASCO, SUPREME COURT OF THE STATE OF NEW YORK, WESTCHESTER COUNTY OF OCTOBER 28, 1982

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

Index No. 19582/80

In the Matter of Confirming the Award of Arbitration between SPERDUTO, SPECTOR & VANACORE (Formerly SPERDUTO, PRISKIE, SPECTOR & VANACORE),

Petitioner,

-against-

EARL HENDERSON,

Respondent.

MARASCO, J.

By order dated January 29, 1982, Mr. Justice William A. Walsh, Jr. of this court vacated a Judgment entered January 30, 1981, which confirmed an arbitration award and directed a hearing to be held to determine the issues of alleged fraud, perjury and misconduct and to decide and determine whether the arbitrator's award should be confirmed or vacated.

Petitioner served on Respondent a Demand for Arbitration dated August 10, 1978, which sought arbitration of disputes arising under a contract between the parties dated May 22, 1975, effective January 1, 1975. Defendant served counter demands dated September 26, 1979. Extensive hearings were thereafter held before

Opinion

Arbitrator Martin L. Baron pursuant to the procedures of the American Arbitration Association. An award was rendered dated September 25, 1980, and it is that award which Petitioner seeks to confirm and which Respondent seeks to vacate in this proceeding.

Pursuant to the aforementioned order of Mr. Justice Walsh, a hearing was held before this court at which each party was afforded an opportunity to present evidence in support of their contentions. Respondent contends that the award should be set aside for misconduct of the arbitrator that Mr. Sperduto, the principal witness for claimant gave willfully false testimony at the arbitration hearing and that the award was untimely issued. Petitioner contends that there has not been sufficient proof of fraud or misconduct to vacate the award and that the untimeliness of the award is no ground to vacate it.

CPLR Section 7511 provides in part:

> "(b) Grounds for vacating.
>
> 1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by:
>
> (i) corruption, fraud or misconduct in procuring the award; or
>
> (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession;"

Opinion

In *Santiago v. City of Plattsburgh,* 70 App. Div. 2d 982, it is stated:

> "It is settled law that the award of an arbitrator is subject to review only on the few basic grounds set forth in the statute."

Clearly, the only grounds on which Respondent may be entitled to relief are those set forth in CPLR 7511 quoted above. In support of the contention that the arbitrator committed numerous instances of misconduct, Respondent relies on a partial transcript of the hearings before the arbitrator and the testimony of of Philip D. Neuer. The transcript of the record before the arbitrator shows that the transcript was made after the direct testimony of Joseph R. Sperduto and at the mid point of his cross examination.

While there are some apparent inconsistencies pointed out by Respondent, this court finds that they are insufficient to establish misconduct on the part of the arbitrator. The arbitrator had wide discretion in considering the evidence and the exercise of such discretion is not misconduct. As the court stated in *Swartz v. Swartz,* 49 App. Div. 2d 254 at p. 257:

> "Once a controversy is properly before the arbitrator, as in the instant case, his powers in resolving it are extremely broad and flexible. As the Court of Appeals recently said: 'Absent provision to the contrary in the arbitration agreement, arbitrators are not bound by principles of substantive law or rules of evidence. *** Their duty is to reach a just result regardless of the technicalities. *** Even where the arbitrator states

> an intention to apply a law, and then misapplies it, the award will not be set aside'. (*Matter of Associated Teachers of Huntington v. Board of Educ.*, 33 NY 2d 229, 235). Or as stated in *8 Weinstein-Korn-Miller,* NY Civ. Prac., par. 7511.18, pp. 75-170-75-171 '[t]hus, if there is any possible way of construing the agreement to encompass the dispute and the arbitrator so construes it in assuming jurisdiction, the courts would seem to lack authority to review the determination. *** Such a conclusion makes arbitration clauses exceedingly dangerous, no matter how circumscribed they appear to be. But it is a logical outgrowth of the tendency to make the arbitrator the judge of his own jurisdiction once validity of the arbitration clause is determined'. Even if an arbitrator refuses to consider relevant evidence because of a mistaken interpretation of a rule of law that makes the evidence irrelevant, the award will be allowed to stand (*Matter of Raisler Corp. [New York City Housing Auth.]*, 32 NY 2d 274, 283)."

On the basis of the evidence presented at the hearing this court finds that there was no misconduct on the part of the arbitrator sufficient to warrant setting aside the award.

The reliance placed by Respondent on the claim that Mr. Sperduto, the witness, for claimant before the arbitrator gave wilfully false testimony is not one of the grounds for setting aside the award as provided in CPLR 7511. In view thereof, this court cannot consider the evidence in support of that contention.

Opinion

The final ground urged by Respondent to vacate the award is that the award was not timely made by the arbitrator. In support of this argument, Respondent relies on Rule 41 of the Rules of the American Arbitration Association which provides that the award is to be rendered no later than 30 days from the closing of the hearings. The hearings were closed on August 18, 1980, and the award was rendered on September 25, 1980, more than 30 days later.

CPLR 7507 provides in part:

> "Except as provided in section 7508, the award shall be in writing, signed and acknowledged by the arbitrator making it within the time fixed by the agreement, or, if the time is not fixed, within such time as the court orders. The parties may in writing extend the time either before or after its expiration. A party waives the objection that an award was not made within the time required unless he notifies the arbitrator in writing of his objection prior to the delivery of the award to him."

In this case there is no evidence that Respondent notified the arbitrator of his objection prior to delivery of the award. In view thereof, this court concludes Respondent waived the objection.

Upon all of the evidence, this court concludes that the motion to confirm the award is granted and the cross motion to vacate the award is denied.

Dated: White Plains, New York
October 28, 1982

Opinion

s/ Carmine C. Marasco
CARMINE C. MARASCO
A.J.S.C.

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AWARD OF ARBITRATOR OF SEPTEMBER 25, 1980

AMERICAN ARBITRATION ASSOCIATION, Administrator

COMMERCIAL ARBITRATION TRIBUNAL

In the Matter of the Arbitration between SPERDUTO, SPECTOR & VANACORE (FORMERLY SPERDUTO, PRISKIE, SPECTOR & VANACORE) AND EARL HENDERSON

CASE NUMBER: 1310-0811-79

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated May 22, 1975, effective January 1, 1975, and having been duly sworn and having duly heard the proofs and allegations of the Parties, FIND, as follows:

A. A claim for loss of business and partnership income is a proper claim arising out of the partnership agreement.

B. Claim 3 concerning the alleged unprofessional conduct of EARL HENDERSON, hereinafter referred to as RESPONDENT, is beyond the scope provided by the partnership agreement for arbitration of controversies arising thereunder.

C. The arbitration was duly authorized by the remaining members of the partnership and counsel was engaged by them to pursue the claim.

D. An agreement limiting the authority of SPERDUTO, SPECTOR & VANACORE (formerly SPERDUTO, PRISKIE, SPECTOR & VANACORE), hereinafter referred to as CLAIMANT, was not made with RESPONDENT, and the subsequent contractual limitations of the remaining partners with

others do not adversely affect CLAIMANT'S right to pursue its remedies against RESPONDENT.

I therefore AWARD, as follows:

1. As to the First Claim, RESPONDENT shall pay to CLAIMANT the sum of TWENTY SIX THOUSAND SEVENTY DOLLARS AND EIGHTY TWO CENTS ($26,070.82) for the value of business of clients of SPERDUTO, PRISKIE, SPECTOR & VANACORE serviced by RESPONDENT after his withdrawal from the partnership.

2. The Second Claim of CLAIMANT is denied.

3. The First Counterclaim of RESPONDENT is denied.

4. a. CLAIMANT shall give RESPONDENT a credit in the sum of TWO THOUSAND SEVEN HUNDRED THIRTY THREE DOLLARS AND SIXTY FIVE CENTS ($2,733.65) in the Second Counterclaim.

b. This credit may be applied against the amount payable by RESPONDENT to CLAIMANT in paragraph 1 above on the condition that RESPONDENT quitclaim and provide an appropriate executed release to the Pension Fund Trustee.

5. All other claims and counterclaims are denied in their entirety.

6. Each party shall bear its own counsel fees.

7. RESPONDENT shall bear the full costs of making and transcribing the record of the hearings inasmuch as only RESPONDENT ordered such a record.

Award

8. The compensation of the arbitrator totaling ONE THOUSAND FOUR HUNDRED DOLLARS ($1,400.00) shall be borne equally by the Parties. Therefore, RESPONDENT shall pay to the American Arbitration Association the sum of ONE HUNDRED DOLLARS ($100.00) for said compensation still due the Association.

9. The administrative fees and expenses of the American Arbitration Association totaling ONE THOUSAND SEVEN HUNDRED FIFTY EIGHT DOLLARS AND THIRTY CENTS ($1,758.30) shall be borne equally by the Parties and postponement fees shall be borne by Party requesting same. Therefore, RESPONDENT shall pay to CLAIMANT the sum of ONE HUNDRED THIRTY DOLLARS ($130.00) for that portion of his share of said fees and expenses previously advanced by CLAIMANT to the Association and RESPONDENT shall pay to the American Arbitration Association the sum of EIGHT HUNDRED FORTY EIGHT DOLLARS AND THIRTY CENTS ($848.30) for that portion of his share of said fees and expenses still due the Association.

10. This AWARD is in full settlement of all claims and counterclaims submitted to this Arbitration.

DATED: September 25, 1980

s/ Martin L. Baron
MARTIN L. BARON

Award

STATE OF NEW YORK §
§ ss.:
COUNTY OF NEW YORK §

On this 30th day of September, 1980, before me personally came and appeared MARTIN L. BARON to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

s/ Leslie Skolnick
NOTARY
Notary Public, State of New York
No. 30-4708954
Qualified in Nassau County
Certificate Filed in New York County
Commission Expires March 30, 1982

RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

Civil Practice Law and Rules

§7511. Vacating or modifying award.

(a) when application made. An application to vacate or modify an award may be made by a party within ninety days after its delivery to him.

(b) Grounds for vacating.

1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds the rights or that party were prejudiced by:

(i) corruption, fraud or misconduct in procuring the award; or

ii) partiality of an arbitrator appointed as a neutral; except where the award was by confession; or

(iii) an arbitrator, or agency or person making the award exceed his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or

(iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

2. The award shall be vacated on the application of a party who neither participated in the arbitration nor was served with a notice of intention to arbitrate if the court finds that:

(i) the rights of that party were prejudiced by one of the grounds specified in paragraph one; or

(ii) a valid agreement to arbitrate was not made; or

(iii) the agreement to arbitrate had not been complied with; or

(iv) the arbitrated claim was barred by limitation under subdivision (b) of section 7502.

(c) Ground for modifying. The court shall modify the award if:

1. there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award; or

2. the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

3. the award is imperfect in a matter of form, not affecting the merits of the controversy.

(d) Rehearing. Upon vacating an award, the court may order a rehearing and determination of all or any of the issues either before the same arbitrator or before a new arbitrator appointed in accordance with this article. Time in any provision limiting the time for a hearing or award shall be measured from the date of such order or rehearing, whichever is appropriate, or a time may be specified by the court.

(e) Confirmation. Upon the granting of a motion to modify, the court shall confirm the award as modified; upon the denial of a motion to vacate or modify, it shall confirm the award.

CROSS REFERENCES

See Insurance Law §675 as to arbitration of "no-fault" claims against insurers. Special provisions for review of arbitrators' awards are contained therein.

United States Constitution

Rights of Persons

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for this offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State

deprive any person of life, liberty, or property, without due process of law; nor deny to any person wiithin its jurisdiction the equal protection of the laws.

SECTION. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the oasis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No reason shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection

or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce by appropriate legislation, the provisions of this article.

NO. 84-1837

Supreme Court, U.S.
FILED
JAN 14 1985
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

EARL HENDERSON,

Petitioner,

vs.

SPERDUTO, SPECTOR & VANACORE (formerly Sperduto, Priskie, Spector & Vanacore),

Respondent.

BRIEF IN OPPOSITION FOR RESPONDENT

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QUESTION PRESENTED

Whether a justiciable issue exists where there has been no finding that perjury was committed before the arbitrator.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

EARL HENDERSON,

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(formerly Sperduto, Priskie,
Spector & Vanacore),

Respondent.

BRIEF IN OPPOSITION FOR RESPONDENT

COUNTER STATEMENT OF THE CASE

In 1977, the Petitioner withdrew from the Respondent accounting firm of Sperduto, Spector & Vanacore. Following this withdrawal and after Petitioner established his own accounting practice in which he continued to serve several of Respondent's former clients, Respondent served on Petitioner a Demand for Arbitration dated August 10, 1978. That demand sought arbitration of disputes arising under a contract between the parties dated May 22, 1975 andeffective January 1, 1975. Petitioner served counter demands dated September 26, 1979. Extensive hearings were thereafter held before Arbitrator Martin Baron pursuant to the procedures of the American Arbitration Association. An award was rendered dated September 25, 1980.

That award was confirmed by the New York State Supreme Court over Petitioner's objections. The Supreme Court, Appellate Division, unanimously affirmed the judgment without opinion. Both the Appellate Division and the Court of Appeals summarily denied Petitioner's motion for leave to appeal.

The Petitioner herein contends throughout that Respondent committed perjury before the arbitrator, and that therefore, the New York State Courts should have vacated the award.

However, the simple fact is that no finding of perjury has ever been made in this case. The New York State Supreme court noted certain "inconsistencies" in Respondent's testimony before the arbitration, but specifically ruled that they were insufficient to justify overturning the aribtrator's decision.

Brief of Petitioner, p. 12a. Therefore, the issue of whether a State Court's refusal to consider evidence of a party's prejury during an arbitration proceeding constitutes a due process violation is not properly presented in this case due to the absence of any finding or admission of perjury.

SUMMARY OF ARGUMENT

There was no perjury committed by Respondent before the arbitrator. Therefore, Petitioner's claim that he was denied due process by the Courts of the State of New York is specious.

ARGUMENT

NO JUSTICIABLE ISSUE EXISTS HERE BECAUSE NO PERJURY WAS COMMITTED BY RESPONDENT

Petitioner's argument that the New York State Courts refused to overturn the arbitrator's decision despite Respondent's perjured testimony presupposes that such testimony was indeed perjury. However, Petitioner cannot cite any instance of perjury in the record for, indeed, none can be found. Therefore, Petitioner's conclusory statements regarding Respondent's alleged perjury should be seen for what they are: a smokescreen intended solely to further delay and protract an essentially simple arbitration matter.

Petitioner states, at page 4 of his brief, that his former counsel

"clearly established that [Respondent] had repeatedly perjured himself during the arbitration proceedings by reference to numerous instances in the transcript." Petitioner states, at page 9, that "[e]ach instance of perjury was provable within the transcript of the hearing."

Yet Petitioner does not cite a single, specific instance in the record to support his contentions. New York Supreme Court, which on September 28, 1982 held a hearing on Petitioner's objections to the arbitrator's award, examined Respondent's testimony before the arbitrator and found nothing more than mere "inconsistencies" on Respondent's part. Accordingly, on the basis of the record herein, which in no way supports Petitioner's contention that Respondent perjured himself, there is no justiciable question presented to the Court for review.

CONCLUSION

Wherefore, Respondent respectfully requests that the petition for a writ of certiorari be denied, with damages pursuant to Rule 49.2 and double costs pursuant to Rule 50.7

Dated: January 8, 1985

Respectfully submitted,

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